No. 21754

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant

v.

EDISON R. NOGUEIRA, ET AL., Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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I N D E X

CITATIONS

Cases:

Rule:

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STATEMENT

Without delineating all the detailed evidence relating to facts upon which the court made no finding, brief reply to some assertions of appellees seems appropriate.

1. Appellees say this was a going mine until the Secretary of the Interior held that the mineral was a common clay (Br. 14). Robert Mattey so asserted at one point early in his testimony by deposition (R. Dep. 13). As the examination proceeded, he testified that in the past he had sold a lot of clay to Mr. Tillotson but had never lived there, that there was a man named Joe Bowers living on the claim at one time, that between 1960 and 1961, no one lived there and he

visited it once a month to check on the equipment and that he knew of the Interior Decision but that "I thought we could continue on mining it, but we could never get a patent under this procedure" (see R. Dep. 24-31). This testimony falls far short of showing unequivocally continuous mining operations being conducted on the premises.

Mattey's statement quoted above, contradicted the assertion (Br. 14-15) that the "mine was not operated because of obstacles put up by the Forest Service." This latter argumentative assertion by Mattey (R. Dep. 49) contrasts with the fact that this law suit is necessary because of appellees' refusal to accede to demands of the Forest Service to surrender possession. Moreover, the first letter on this subject appears to be in April 1962, 11 months after the purported location of the new discovery in May 1961. (See Exhibit 1 to M. Dep.) Neither at the time nor later until this suit was brought is there any indication of any physical action taken by the appellees to mine, explore or develop the claim. The vague assertions of Edison Nogueira are as follows (E. Dep. 12-13):

> Q. Did you personally ever dig out any of the clay or material that was on the mine, personally yourself?

A. Yes.

Q. When did you do this?

A. Oh, most every week when I stay here I go around all the mines and look.

Q. What did you do with it?

A. Try to locate the veins of the mine and to look to the deposits of all the places.

Q. Have you ever sold any material from the mine?

A. No, we do not sold one material at all.

Q. Did you store the samples that you took, have you stored them any particular place on the area?

A. We did, the companies they have some reports, samples and laboratory tests they have.

Q. You are talking about the McBean Company?

A. McBean or the Riverside -- South Pacific Clay Company and Riverside Cement Company made the report.

Q. Their samples were taken in 1962 and '63; is that correct?

A. Yes.

Q. Have any samples been taken since 1962 or '63?

A. Was not necessary. I told Maria was not necessary to do any more sampling because we sample, since 1903 thought I have same every day for that we prove good.

Q. Prove good in 1903?

A. Yes. Since that years the clay has been proven fire clay.

In contrast, affidavits by Forest Service employees included statements of Edison that he had not engaged in mining operations since occupying the premises and that physical inspection revealed no signs of recent mining operations (R. 94-95, 121). The only definite information concerning the negotiations which appellees' brief characterizes as "efforts to exploit the fire clay" related to the Gladding-McBean Corporation and its successor International Pipe & Ceramics Corporation. An official of that company stated that Mr. Nogueira had approached them in March 1962 concerning clay (without making any distinction as to fire clay); that the probability of getting clay from a property owned by Mr. Tillotson was discussed; that "He told us of the Mattey claim suit and that Nogueira was no more than a squatter;" and in September, Mr. Nogueira was told to stop bothering that company's people at its Corona facility (R. 122-123).

ARGUMENT

I

SUMMARY DISMISSAL OF THE CLAIM OF THE UNITED STATES TO POSSESSION AND TO TRESPASS DAMAGES WAS NOT WARRANTED

There can be no dispute as to the jurisdiction, indeed obligation, of the district court to award the United States

an order of possession and damages for past trespass, absent some right of the defendants to exclusive possession as against the United States (U.S. Br. 11-12).[1/] Appellees seek to rely upon a right of prospecting which they define as "searching for valuable minerals" as distinguished from mining--"extracting valuable minerals from the ground" (Br. 37). What possession might be justified under prospecting rights has nothing to do with this case. Appellees admittedly performed no act relating to "searching" for anything in the ground. Nor did Robert Mattey. He said "I refiled on this claim again, using fire clay as a new discovery as my contention of validity" and that "we always knew that this [the fire clay] was there" (R. Dep. 7, 12). The extent of a prospector's right to possession for that purpose is plainly irrelevant to this case.

Appellees' only other attempt to justify their continued possession is that Judge Hall had resolved a disputed question of fact "on conflicting evidence" that the occupancy was "incidental to the prospecting, mining and processing operation" (Br. 38). Obvious and complete answers are (1) Judge Hall did not purport to make any such fact finding in the only finding

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1/ Our opening brief will be so cited.

of fact on the subject which states that defendants "are in possession of and occupying" the claim (meaning the physical tract of land) (Fdg. 3, R. 152), and that they are in possession "as successors in interest to Robert A. Mattey" (Fdg. 7, R. 153), without any mention of nature or character of possession, (2) any such finding would have been clearly contrary to the undisputed evidence, (3) such a finding cannot be used to support summary judgment, (4) such a finding cannot possibly support a conclusion of law that "this Court has no jurisdiction to determine the right of the defendants to occupy the GRAPEVINE placer mining claim" (R. 153), and (5) such finding does not contain the subsidiary specific findings necessary to demonstrate the basis for the court's conclusion. United States v. Forness, 125 F.2d 928 (C.A. 2, 1942), cert. den., 316 U.S. 694.

II

THE DISTRICT COURT HAD JURISDICTION IN THIS CASE TO PASS UPON THE VALIDITY OF THE 1961 MINING LOCATION

A. Best v. Humboldt, 371 U.S. 334 does not preclude jurisdiction. - Little need be added to our discussion of this matter in our opening brief (pp. 13-17). Best does not in terms reject this Court's Kennedy and Schultz cases even though they

were, as appellees recognize (Br. 21), specifically called to the attention of the Court. The fact that Kennedy involved a stock raising homestead entry rather than a mining claim (Br. 31-32) is, in our view, no distinction on the jurisdictional question. Schultz, upon which Kennedy relied did involve a mining claim, hence appellees are compelled to say it "is no longer the law" (Br. 32). We disagree.

Appellees' quotations (Br. 18, 21) as to the exclusive authority of the Department of the Interior concerning legal title are not directed to the present problem, which concerns the right to possession. Schultz, as quoted in Kennedy, made this distinction clear (see U.S. Br. 13). Appellees also discuss here the possessory rights of location before discovery (Br. 28-30, 33-34). Since, as noted supra, p. 4, we do not have a miner "in possession, diligently working towards discovery" (Br. 29) that principle is of no aid to appellees.

B. The Court does not have discretion to refuse to exercise its jurisdiction. - The United States has a right to the relief to which it is entitled (U.S. Br. 12). The abstention doctrine invoked by appellees (Br. 23-24) has no application here. Zwickler v. Koota, O.T. 1967, No. 29, decided

December 5, 1967, states:

> The judge-made doctrine of abstention, first fashioned in 1941 in Railroad Commission v. Pullman Co., 312 U.S. 496, sanctions such escape [from existent federal court jurisdiction] only in narrowly limited "special circumstances." Propper v. Clark, 337 U.S. 472, 492.

There are no such "special circumstances" in this case.

C. The 1961 purported discovery is no defense to this action if it were not a bona fide location made for the purpose of mineral development. - Appellees rely upon language of Coleman v. United States, 363 F.2d 190 (C.A. 9, 1966), reh. den., 379 F.2d 555 (1967), cert. granted 389 U.S. ___, discuss matters concerning the original administrative proceedings and then stray off to other matters (Br. 34-37). No issue of good faith was raised in the administrative proceedings as to the original location which was invalidated for a lack of discovery. There have been no administrative proceedings as to the 1961 alleged relocation. Thus, the validity of language in Coleman as to what procedural requirements are applicable to good faith attack upon locations in administrative proceedings is not in issue here.

The complaint in this case was based upon the final administrative decision declaring the original location void

for lack of discovery (R. 1-4). It was only in appellees' answer that an issue was raised as to purported right to possession under the location filed in 1961 (R. 8-14). The Federal Rules of Civil Procedure provide, so far as here material, only for a complaint and an answer and that "No other pleading shall be allowed" (Rule 7(a)) and that "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided" (Rule 8(d)). Any pleading attacking the validity of the 1961 location whether for lack of good faith or for other reason was thus specifically precluded.

CONCLUSION

It is submitted that the judgment of dismissal should be reversed with directions to order ejectment of the defendants and the award of trespass damages.

Respectfully,

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CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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